Supreme Court of the United States

October Term, 1977
No. 77-426

IN RE: WILLIAM T. WULIGER,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The issues raised herein were raised in the Ohio Supreme Court on appeal from the ruling of the Court of Appeals for Cuyahoga County, Ohio.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Where the Order of the Court of Appeals is not an adjudication of the issues and not a final Court Order or Judgment, there is no appealable issue based on the Court of Appeals' Order.

2. Where a lower court has failed to procedurally record and delineate its Findings of Fact and Conclusions of Law, the Court of Appeals has the authority to reverse the lower court's decision and remand the matter to the lower court for further consideration pursuant to the Court of Appeals' instructions.

STATEMENT OF THE CASE

Petitioner was assigned to represent defendant, Charles Jordan in Case No. CR 14174. During the course of the trial, petitioner displayed a contemptuous attitude toward the Court by asking an objectionable line of questions—questions that the Court had repeatedly admonished petitioner not to pursue.

On October 1, 11, and 25, 1974, the Court found the petitioner in contempt for deliberately disregarding the Court's instructions not to persist in following certain lines of questioning.

In regard to petitioner's contempt citation of October 1, 1974, the record shows a series of questions asked by the petitioner, to which the Court repeatedly sustained objections (R. 2597). The purpose of these questions was to give the jury the impression that a State's witness is a murderer, an offense of which he was neither convicted nor even charged.

After the Court asked petitioner if he recalled the admonitions of the Court of September 30, 1974, there was a finding of contempt (R. 2597, 2603, 2604, 2605). The record reflects that petitioner was repeatedly admonished not to pursue such questioning and that he had been forewarned on September 30, 1974. The Court specifically told petitioner that he was in contempt and further, told him the very reason why he was in contempt (R. 2315 to 2334).

Petitioner asked the following question of State's witness, Keith Reider:

> "MR. WULIGER: Officer, have you ever participated in an arrest where the suspect did not get back to the station alive?" (R. 4304)

Such a question was highly improper and again suggested to the jury that another witness, Keith Reider, a police officer, had killed someone that he had arrested. This question had nothing to do with the facts of this case, and there was no evidence that Officer Reider had even been associated with such an incident.

The Court then found petitioner in contempt:

> "THE COURT: Please be seated. You may be excused, Officer.
>
> Mr. Wuliger, by your last question directed to Officer Keith Reider, you again suggested that a witness in this case was guilty of a violent crime in direct violation of repeated instructions of this Court, and I find you in contempt.
>
> Sentence will be at the conclusion of this case." (R. 4330)

Again, the Court found petitioner in contempt and told him precisely why he was in contempt; also the Court reiterated that petitioner had been warned previously.

In regard to petitioner's contempt citation of October 25, 1974, the record at page 6375 shows that petitioner asked the following question, again with the purpose of trying to give the jury the impression that a witness had committed a crime that he was neither charged with nor convicted of:

> "MR. WULIGER: Now, in conjunction with your work in the Homicide Unit, had you ever heard the name Schoolboy Jackson?
>
> • • •
>
> MR. WULIGER: All right sir, in the last two years there have been a number of detectives associated with drugs in the City of Cleveland?"

The Court, at pages 6384 and 6385 stated:

(R. 6384, to Mr. Wuliger):

> "THE COURT: You were again attempting to show that the witness in this case has committed crimes; murder, which he has not been charged with or convicted of."

(R. 6385):

> "THE COURT: Mr. Wuliger you will recall the Court's previous admonitions and the previous two citations for contempt when you were engaging in that line of questioning?
>
> MR. WULIGER: I am aware that I have been cited for contempt, yes, sir.
>
> THE COURT: And you are aware of the Court's admonitions. You haven't forgotten those, have you?
>
> MR. WULIGER: I am aware of the admonitions the Court gave me."

The Court then found petitioner in contempt a third time.

In each case where petitioner was found in contempt, the record shows that the Court had previously warned petitioner not to continue certain lines of questioning, that the Court told the petitioner the specific reason why he was found in contempt, and continually warned and admonished the petitioner not to ask improper and misleading questions.

The record also shows that petitioner knew and understood why he was in contempt, so there was no purpose in recording the Court's reasoning in the Journal Entry since it has been well documented in the case record and the petitioner was told why he was in contempt (R. 2597-2605).

On December 2, 1974, the Court sentenced the petitioner to 30 days in the County Workhouse for having been found in contempt on October 1, 11, and 25.

Petitioner appealed the contempt convictions. The Court of Appeals reversed the contempt convictions and remanded the case for the purpose of having the trial court journalize its findings of fact and conclusions of law; having another court sentence petitioner; and for a finding and delineation of the facts constituting the acts of contempt.

Petitioner appealed the Court of Appeals' Order remanding the case to the Supreme Court of Ohio. A Memorandum Opposing Jurisdiction was filed. The Ohio Supreme Court accepted jurisdiction of the case. On appeal the Ohio Supreme Court dismissed the appeal for want of a final appealable order.

Now the Petitioner files this Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

1. Where the Order of the Court of Appeals is not an adjudication of the issues and not a final Court Order or Judgment, there is no appealable issue based on the Court of Appeals' Order.

In *State v. Treon*, 91 Ohio L. Abs. 229, 188 N.E.2d 308, the general rule in cases of direct contempt is stated to be that the trial court's judgment or order of direct contempt must itself contain a complete and clear statement of the facts upon which the conviction is based. The guilt of a person accused of contempt must be shown affirmatively on the record before a reviewing court may affirm. Also see *State v. Weimer*, 37 Ohio St. 2d 11, 305 N.E.2d 794 (1971); *State v. Hershberger*, 83 Ohio L. Abs. 62, 168 N.E.2d 13 (1960); *U. S. v. Marshall*, 451 F.2d 372 (9th Cir., 1971); *Ex Parte David W. Brown*, 530 S.W.2d 228 (Missouri Supreme Court, 1975); *U. S. v. Schrinisher*, 493 F.2d 842 (5th Cir., 1974). However, *Treon* and parallel cases are not binding authority as to what remedy a reviewing court must resort to when the trial court's reasoning upon which a direct contempt conviction is based is inadequately expressed in the journal entry or completely absent therefrom.

A "final order" is defined in the Ohio Revised Code, Section 2505.02 as:

> "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

Cincinnati v. Cormany, 96 Ohio St. 596, 118 N.E. 1092 and *Realty Holding v. State*, 115 Ohio St. 736, 156 N.E. 143 explain that it is necessary that a final order or judgment be entered in the Court of Appeals to warrant an appeal on law questions to the Supreme Court of Ohio. A judgment of a reviewing court is complete, final, and reviewable when its action and instructions to the trial court are definitely stated, the reasons therefore are clearly recited, no required action is omitted and the cause is remanded to the trial court for retrial. *Lesh v. Lesh* (1941), 138 Ohio St. 492, 37 N.E.2d 383, 210 Ohio Ops. 362.

On applying the aforementioned requirements for an appeal of an order to the instant case it becomes apparent from the evidence that the order in question is not a final order and, therefore, cannot support an appeal to the Supreme Court of Ohio. The Court of Appeals' Journal Entry reflects that the issues of whether the petitioner was actually in contempt of court and whether the thirty day sentence imposed was disproportionate were not adjudicated. These matters were remanded for delineation of the facts to support them which were absent from the record.

The Court of Appeals' Order reversing and remanding the case for further proceedings is not a final order because it does not meet the text of *Lesh v. Lesh, supra.* The order is not dispositive of the issues involved and further action in the trial court is necessary before the issues may be resolved. Also see *Bolles v. Stockman*, 42 Ohio St. 445. Since the order is not a final order, it cannot support an appeal to the Supreme Court.

In *People v. Miller*, 51 Ill.2d 76 (1972) the Court noted that direct contempt is predicated upon specific misconduct, and an order imposing punishment for direct contempt must state, or the record must show, the specific

acts upon which it is based, and the order must be sustained upon the grounds upon which it was imposed. The Court went on to hold that an order charging counsel with direct contempt will be reversed (with no remand for further proceedings) where the conduct was a good faith attempt to represent clients and did not hinder the court's function or dignity. Also see *Ward v. State,* 513 P.2d 350 (Okla. Ct. of Crim. App. 1973); *State v. Aspell,* 10 Ohio St. 2d 1, 225 N.E.2d 226 (1967); *Robinson v. State,* 19 Md. App. 20, 308 A.2d 712 (1973); *Pinkney v. DeBartolo* (Cuyahoga Co. #34908, 1975). *Miller* and parallel cases may be distinguished from the present fact pattern because in *Miller et al.,* however inadequate the records were, they were sufficient for the reviewing courts to ascertain the quality of counsel's conduct and conclude that it did not constitute a direct contempt of court. In the instant case, facts necessary to decide the issues are absent from the record. Therefore, *Miller* and parallel cases are not controlling precedent.

An order to remand for further proceedings is not tantamount to placing the petitioner in jeopardy a second time in violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution and Section I, Article 10 of the Constitution of the State of Ohio. Simply stated, double jeopardy stands for the legal principle that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future law suit. *U. S. v. Oppenheimer,* 242 U.S. 85, 37 S. Ct. 68 (1916). On applying the principle of double jeopardy to the instant fact pattern, it is clear that there is no danger of exposing petitioner to a double jeopardy situation. An order reversing and remanding a case is not a final order. See *Bolles v. Stockman, supra.* Therefore, the proceeding at the trial court level on remand does not subject petitioner to double jeopardy.

2. Where a lower court has failed to procedurally record and delineate its Findings of Fact and Conclusions of Law, the Court of Appeals has the authority to reverse the lower court's decision and remand the matter to the lower court for further consideration pursuant to the Court of Appeals' instructions.

If because of the condition of the record the Court on appeal cannot determine what judgment should be made, it may remand the case for further proceedings in the trial court. If the record is insufficient to justify entry or direction of a decree, or the evidence is inadequate to support a material issue, no final decree is rendered in the appellate court except to the extent of setting aside the decree in the lower court and requiring further proceedings to be had therein. Ohio Revised Code, Section 2701.01. This power of the appeals court to remand is represented in case law by the view in *Martin Baking Company v. Tompkinson,* 27 Ohio App. 355, 161 N.E. 288, in which the court held that where the doctrine of last clear chance was not in issue, appellate court will not render final judgment for plaintiff on the grounds that she was contributorily negligent as a matter of law, but will remand the cause for further proceedings.

In the instant case, the lower court did not journalize its Findings of Fact and Conclusions of Law on the issue of contempt nor in justification of the sentence imposed. In light of the above mentioned authority it was fully within the discretion of the Court of Appeals to reverse and remand this cause of action for further proceedings to complete the record.

Tumey v. Ohio, 273 U.S. 510 (1927) states the rule that to subject a defendant to a trial in a criminal case involving his liberty or property before a judge having a direct, personal, substantial interest in convicting him

is a denial of due process of law. *Tumey* is not precedent for procedure in a direct contempt case such as the one at bar. *Cooke v. U. S.*, 267 U.S. 517, 539 is the leading case for procedure in instances of direct contempt. *Cooke* provides that when a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. Also see *Ex Parte Terry*, 128 U.S. 289. But where the contempt was not in open court due process of law requires charges and that the accused be advised of them and be given a reasonable opportunity to defend or explain, with the assistance of counsel, if requested and the right to call witnesses in proof of exculpation or extenuation.

In *In re*: *Murchison*, 349 U.S. 133 (1950) a Michigan judge served as a "one-man grand jury" under Michigan law in investigating crime. Later, the same judge, after a hearing in open court, adjudged two of the witnesses guilty of contempt and sentenced them to punishment for events which took place before him in the grand jury proceedings. It was held on appeal that their trial and conviction for contempt before the same judge violated the Due Process Clause of the Fourteenth Amendment. Also see *Unger v. Sarafite*, 376 U.S. 575 (1964). *Unger* and *Murchison* can be differentiated from the instant fact pattern in that here the judge which found petitioner in contempt is not on the appeals court which reviewed the case. Therefore, petitioner has not been denied due process by having had his case reviewed on appeal by a judge who has a direct, personal or substantial interest in convicting him. *Tumey v. Ohio, supra.*

In *Taylor v. Hayes*, 418 U.S. 488 (1974), the trial court's conduct, in proceeding summarily after trial to

punish petitioner for alleged contempt committed during the trial without giving him an opportunity to be heard in defense or mitigation before he was finally adjudged guilty and sentence was imposed, was in contravention of the Due Process Clause of the Fourteenth Amendment. The reviewing court held reasonable notice of the specific charges and an opportunity to be heard in front of another judge should have been afforded because it appeared from the record that "marked personal feelings were presented on both sides" and that the convicting judge was unable to remain impartial. Also see *Mayberry v. Pennsylvania*, 400 U.S. 455, 464.

Taylor is distinguishable from the case at bar and others concerning "the trial judge's power for the purpose of maintaining order in the courtroom to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him". *Taylor v. Hayes*, 418 U.S. at 497. In *Taylor* the final adjudication and sentence were postponed until after trial when the usual justification of necessity is not nearly so strong. See *Offutt v. United States*, 348 U.S. 11, 14 (1954).

CONCLUSION

Respondent, State of Ohio, respectfully moves this Court to dismiss the petitioner's Petition for Writ of Certiorari for want of a substantial Federal Constitutional issue.

All the facts of this case are governed by Ohio Law. The Cuyahoga County Court of Appeals for the Eighth Judicial District and the Ohio Supreme Court properly heard and disposed of all relevant issues arising from this case.

Ohio Law was properly interpreted and applied to the issues of this case by the Ohio Courts.

There is no basis for the Petition for Writ of Certiorari.

For the above reasons we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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